A. H. GARLAND,
B. C. GARLAND,
For Appellants.

IN THE

Supreme Court of the United States.

JAMES T. SIMMS, *Appellant*,

vs. **No. 402.**

HANNAH T. SIMMS, *Appellee*.

Brief of Appellant in Opposition to Motion to Dismiss.

Accompaning this motion there is no part of the record printed and the court is left to search out, as best it may, the parts in the record which bear upon this motion. Under the rule and practice of this court, this motion to dismiss should not be noticed; but as it is here, and the matters set out in the motion will have to be considered first or last, a short response to it is here presented. In the first place, there is gross error in appellee's statement that the decree of the territorial court awarded appellee alimony and counsel fees, *pendente lite*; on the contrary, the suit was pending a long while and no mention is made of alimony and counsel fees, pending the suit, until the final trial of it, and then, suddenly, the decree of $7,250 was rendered, and in that decree was included the sum of $750, as alleged for alimony and counsel fees pending the suit. This is not alimony and counsel fees in any sense of the word.

In the second place, the statement that the matter in dispute does not exceed the sum of $5,000, would fool and mislead persons who had not examined the record; for the record shows that after the decree of $7,250 was entered, and after the appellant had prayed his appeal and the same was granted, and perfected in the court, the appellee came forward in a spirit of high christian liberality, and remitted the sum of $250. When the court will examine these facts, it will see at once that this was a bare-faced attempt to rape the appellate court of its jurisdiction.

The attempt then is made to beg the case away, because, under the act of congress, the jurisdiction here does not attain if the matter in dispute is less than $5,000. Really the matter in dispute in this suit was not a money demand, as contemplated by the act of congress. Alimony and counsel fees were a mere incident of the suit, and it appears here that they were entirely an after-thought, and the pretended claim they were given here to enable the wife to defend herself, is almost grotesque, for she, as the record shows, had the much larger property of the two; and it does not help the case at all to say the granting of alimony is discretionary with the trial court; because, if that were true, in its widest sense, that discretion is not an arbitrary one, but is a judicial discretion to be exercised in accordance with established rules wisely adapted to the facts apparent in each particular case, and when the discretion is abused, is a matter for which the appellate court will grant relief.

It can scarcely be necessary to cite authorities to support these propositions; but we will offer a few, so that we may not be considered as disrespectful to opposing counsel.

Mr. Bishop on Marriage and Divorce, sec. 394, says: "When the wife has sufficient separate property, the reason for giving her temporary alimony or suit money does not exist, and she is not entitled to either."

In Westfield *v.* Westfield, 36 N. J., Equity, page 195, the court, after quoting from Mr. Bishop, as above, on page 198, says: "When the wife has sufficient separate property, the reason for giving her either temporary alimony or money to defray her expenses of the suit does not exist, and she is not entitled to either."

And Judge Rapallo, in delivering the judgment of the Court of Appeals of New York in a recent case, says: "If the wife has sufficient means of her own, temporary alimony is not allowable. The fact that the wife is destitute of means to carry on the suit and support herself during its pendency is as essential as any other fact to authorize the court to award temporary alimony. It is not a mere matter of discretion, but a settled principle of equity."

Collins *v.* Collins, 80 N. Y., p. 1, on p. 12.

In Hadden *v.* Hadden, 18 Southern Reporter, p. 799, the court says on page 780: "The law seems to be well settled that two things must concur and must be made to appear before a court is justified in making any allowance to the wife in divorce proceedings for temporary alimony and for counsel fees. First, necessity therefor must appear on the part of the wife from her want of sufficient means to maintain herself during the litigation and with which to employ counsel. Second, and it must also appear that the husband has pecuniary means to supply that necessity." Citing:

Kenermer *v.* Kenermer, 26 Ind., 330.
Paite *v.* Paite, 41 Miss., 116.
Westerfield *v.* Westerfield, 36 N. J., Equity, 195.
Maxwell *v.* Maxwell, 28 Hun (N. Y.), 556.
Ross *v.* Ross, 47 Mich., 185.
Turner *v.* Turner, 22 Pacific, 72.
Chaires *v.* Chaires, 10 Fla., 308.
Underwood *v.* Underwood, 12 Fla., 434.

The court further says: "It is further well settled that the granting or withholding of such allowance is within the discretion of the court to whom the application therefor is made, but

this discretion is not an arbitrary one, but is a judicial discretion to be exercised in accordance with the established rules wisely adapted to the facts apparent in each particular case, and when the discretion is abused, is a matter from which an appellate court will grant relief."

The court in the case above cited further says: "That the court below having granted the plaintiff in this action, which was the wife, temporary alimony pending the litigation, that she, the wife, had equally as much, in fact considerably more, property and available means than her husband, the defendant, and that she acquired all of it from her husband, that the requisite necessity on her part for the allowance of temporary alimony and counsel fees was conclusively shown to be absent, and that her application therefore should have been denied. The court, therefore, ordered the decree allowing her temporary alimony to be reversed.

We submit that this case is on all fours with the one at bar. The record in this case shows that all the property of the plaintiff was heavily mortgaged, and that long before the alleged desertion, the defendant herself admits that she mortgaged a portion of her separate property to raise money for the plaintiff, which conclusively shows that the plaintiff was unable to raise any more money on his property, and we submit that this judgment for alimony and suit money should be reversed and set aside. Again, when money is raised by the wife on her own credit it is not reimbursable *pendente lite* at the court's discretion.

Loveren *v.* Loveren, 35 Pac. R., 87.

The record further shows that at the time the defendant married the plaintiff the plaintiff was worth $40,000; that afterwards in some of his undertakings as he says, he "went broke," but at the time he came to Arizona he was worth in his own right $25,000 or $30,000.

The reference to *Barber v. Barber, 21 How., 582*, as showing that this court disclaims altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony either as an original proceeding in chancery, or as an incident to divorce *a vinculo*, or to one from bed

and board, has no bearing here, for that has reference entirely to United States courts proper in the States, and has no reference, or could have none, to the territorial courts.

Then we are in conclusion served again with the delicious *morceau* that $250 was remitted, and therefore there is no jurisdiction. This release or attempted release, was made after the case was closed, and after it had been appealed in due form of law, and it is respectfully submitted, the jurisdiction of that court ended for all purposes; the jurisdiction had attached in the appellate court, and the supposed order granting the release was absolutely void.

Keyser *v.* Farr, 105 U. S., 265, *et seq.*, which is especially in point.

Coates *v.* Wilkes, 94 N. C., 174.

Stone *v.* Spillman, 16 Tex., 432.

Levi *v.* Karrick, 15 Iowa, 444.

Penrice *v.* Wallis, 37 Miss., 172.

Skinner *v.* Bland, 87 N. C., 168.

We beg leave to submit a portion of the dissenting opinion of Judge Rouse, upon this branch of the case, as being perfectly conclusive, and we deem any further argument as superfluous.

To the judgment of this court affirming the said judgment of the district court, allowing said sum for counsel fees and the allowance to defendant of $150 per month from December 14, 1893, as alimony, I dissent.

It appears from the record that the defendant has no children, or any one dependent upon her for support; that long before there was any move on the part of plaintiff toward an effort to secure a divorce, a division of plaintiff's property was made with defendant, so that, by good and sufficient instruments, what was considered by both parties to be one-half of all his possessions was

transferred to her. By said transaction defendant received real estate from plaintiff proven on this trial to be worth at the date of the trial something over $40,000. That said property was her separate property, and under her control from the date when so conveyed to her, and from that time to the date of the trial. Said division of the property was made with the express purpose of disposing of the community property, and to make full preparations for the preservation of the wife's rights.

The statute of this territory provides:

"If the wife, whether complainant or defendant, has not a sufficient income for her maintenance during the pendency of the suit for a divorce, the judge may, either in term time or in vacation, after due notice, allow her a sum for her support in proportion to the means of the husband, until a final decree shall be made in the case."

R. S. of 1887, paragraph 2120.

That statute gives the judge or court, pending the action, certain power. This power of the judge or court depends, first, upon the fact that the wife has not a sufficient maintenance; second, after due notice has been given; third, the allowance must be in proportion to the husband's means; fourth, the allowance can only be until the suit is terminated.

The complaint in the case at bar was filed October 9, and the answer thereto October 18, 1894.

No motion for alimony was made by defendant until April 2, 1896, nearly eighteen months after issue was joined. On that date her motion was made and notice served on plaintiff and counter affidavits were filed, but no order was made with reference thereto, and nothing done thereon until the date of the final judgment, June 6, 1896, and then only in the final judgment.

The power to grant alimony is pending the action for divorce, not at the time when the divorce is refused and case is dismissed. It is an allowance for the wife's support, and to provide her with the means to prosecute the action or make her defense.

R. S., paragraph 2120.

She had maintained herself and had been represented by a number of distinguished attorneys from the begininng. The suit was at an end when the judgment for an allowance was made.

Again, the record shows that defendant owned property in her own right, acquired from plaintiff, of equal value to that which he owned, of the value of over $40,000, which was productive. Before alimony can be allowed, it must be shown that the wife has not sufficient income for her maintenance during the pendency of the action.

Paragraph 2120, *supra.*
Bishop, Marriage and Divorce, sec. 394.
Collins *v.* Collins, 80 N. Y., 12.

The judgment in this case for alimony was at the time the divorce was refused; it was not pending the action.

The judgment then was a money judgment in favor of the wife, to be enforced against her husband by an execution, notwithstanding the fact that she was possessed of large means, and was robed during the pendency of the suit with the marital right to draw on her husband's credit for her support, and notwithstanding the fact that she may have secured a maintenance in that way during that time. The allowance was $150 per month for a period from December, 1893, up to the date of the judgment; covering a period of nearly a year before the suit was filed; covering a period when only the mutterings of a threatened domestic storm was approaching, but when no storm was actually raging.

The judgment for alimony was for a sum over $5,000, of which $750 was for counsel fees.

The statute only authorizes the court to make an allowance to the wife for her maintenance during the pendency of the suit; the allowance cannot be made after the suit is terminated. The allowance can only be on motion made after notice, not before, and certain conditions must be shown to exist before the order can be made. In this case the motion was made and notice given but no order was made. The action is for a divorce, and not an action for a division of the property between plaintiff and defendant, or for a personal judgment between them. The divorce being refused, the parties remained husband and wife, with all the rights of such, and governed by all the laws pertaining to the marital relation. The only judgment that could be pronounced in this case, on the refusal of the divorce, was a judgment for costs. If the court had, prior to that time, made an order allowing the wife support, etc., and said order had not been complied

with, it would have had power to have enforced said order; but it had no power to enter the judgment for allowance, which was entered. That judgment, as has been stated, reaches back to a time when there were no domestic troubles, and, in effect, regulates the domestic affairs of the parties at a time when they were not before the court.

By statute it is provided:

"The court pronouncing a decree of divorce from the bonds of matrimony shall also decree and order a division of the estate of the parties in such a way as to the court shall seem just and right, having due regard to the rights of each party and their children, if any; provided, however, that nothing herein contained shall be construed to compel either party to divest him or herself of the title to separate property."

R. S. 1887, paragraph 2114.

If a divorce had been granted in the case at bar, the court could have divided the community property between the parties, as would have been just and right, but could not have interfered with their separate property.

It is further provided:

"The court may award costs to the party in whose behalf the sentence or decree shall pass, or that each party shall pay his or her own costs, as to the court shall appear reasonable."

R. S. of 1887, paragraph 2122.

There are no other provisions of the statutes applicable to the case at bar, and hence we hold that the only judgment the court could render was a judgment for costs of the suit.

The judgment was entered in this case on the 13th day of June, 1896, for the sum of $5,235, exclusive of costs, and the motion for a new trial and to set aside said judgment, was overruled and denied on June 29, 1896. Thereafter, on June 30, 1896, plaintiff filed an appeal bond in the sum of $11,000, which was duly approved, and appeal granted. Thereafter, on the 15th day of July, 1896, defendant gave notice to plaintiff that on July 27, 1897, she would apply for an order for alimony, pending the appeal of said case, and on said date last mentioned the judge made a decree, ordering and adjudging that plaintiff pay to defendant, within ten days, $250 for her support, as alimony at the

rate of $150 per month from the date of the said former decree, viz, June 13, 1896; and the further sum thereafter of $150 per month in advance, from the 1st day of August, 1896, during the pendency of the action; and the further sum of $500 as counsel fees.

Thereafter, in the supreme court, the appellee, defendant below, on the 27th day of January, 1897, filed in the supreme court her motion, prepared on January 23, 1897, for an order dismissing said appeal, for the reason that appellant had not complied with the decree and order last above referred to, and on the same date, viz, January 27, 1897, her attorneys, Messrs. Kibbey, Barnes, Millay, and Bennett, filed a motion to remit all of the judgment of the district court for alimony and attorneys' fees, in excess of $5,000, to-wit: the sum of $250.

It will be observed that at the date of the judgment the amount decreed in favor of defendant was $5,250; that plaintiff perfected his appeal on June 30, 1896; that thereafter the court decreed that plaintiff should pay defendant $150 per month; that $250 was due to August 1, 1896; that in addition thereto he was to pay her $500 for counsel fees. Due at the date of said motion, viz, January 27, 1897:

Original judgment	$5,250.00
Alimony to August 1, 1896	250.00
Alimony per month thereafter to February 1, 1897	900.00
Counsel fees	500.00
Making in all	$6,900.00

The bond on appeal was both an appeal and a stay bond. After it was executed, approved, and filed, the appeal was complete, and the district court no longer had jurisdiction of the case.

R. S. of 1887, paragraph 865.

The case then was under the jurisdiction of the supreme court on appeal, and said court had jurisdiction of the case, as it was on the date the final judgment was entered by the district court.

"Any party in whose favor a verdict or judgment has been rendered may in open court remit any part of such verdict or judgment, and such remitter shall be noted on the docket and

entered in the minutes, and execution shall thereafter issue for the balance only of such judgment after deducting the amount remitted."

R. S. of 1887, paragraph 817.

It is evident from said paragraph and from the remaining paragraphs of the chapter of the statutes to which it belongs, that the remitter can only be entered in the district court, and only in that court before an appeal has been perfected, excepting as is provided by the following:

"If in any judgment rendered in the district court there shall be an excess of damages rendered, and before the plaintiff has entered a release of the same in such court in the manner provided by law, such judgment shall be removed to the supreme court, it shall be lawful for the party in whose favor such excess of damages has been rendered to make such release in the supreme court, in the same manner as such release is required to be made in the district court; * * *"

The course to be pursued in entering a remitter not in term time, is pointed out and directed by paragraph 818, R. S. of 1887. That course was not pursued in this case, and even if the case at bar was such in which a remitter could be entered, the appellee failed to pursue the course prescribed by law and the judgment has to remain as it was entered in the district court.

It will be observed, however, that the right to remit is given only to a plaintiff. It is evident that the right is given to one who has instituted a suit to recover a money judgment or property of a certain value, that he may make a verdict or judgment which is in excess of the amount claimed, a valid verdict or judgment by having them correspond with the allegations of the complaint, or to correspond to the evidence on the trial. In the case at bar, the judgment was for $5,250; to secure an appeal and a stay of the judgment, plaintiff was required by law to execute a bond for at least double that sum. A bond in a smaller sum would not have stayed the execution.

The right of appeal from the district to the supreme court, is fixed on a value of the matter in controversy, at $200. Suppose the judgment of the district court exceeds that sum and an appeal is taken, can it be successfully maintained, that after the appeal

has been perfected, the appellee can destroy the jurisdiction of the supreme court by entering a remitter so as to bring the amount just under $200?

Again, suppose a suit should be instituted in a court for a sum in excess of the jurisdiction of said court, could jurisdiction be retained by the plaintiff, after judgment, remitting all in excess of the jurisdictional sum? We contend that a remitter can only be made to correct an error in the verdict or judgment, by reason of the fact that the verdict or judgment is in excess of the amount claimed, or that the evidence does not support the verdict or judgment.

It is apparent that in the effort to remit the insignificant sum of $250 that it was the purpose of appellee to prevent the case from going to another tribunal for review, by having the judgment reduced to just $5,000. As stated before, this is not an action for a money judgment. The money part of the judgment is a mere incident. It was imposed, in our judgment, without any legal authority, hence we think the judgment should be reversed, and the case dismissed.

O. G. ROUSE,
Associate Justice, Supreme Court.

Very respectfully submitted,

A. H. GARLAND,

R. C. GARLAND,

For Appellant.

No. 16.

FILED
OCT 10 1899
JAMES H. MCKENNEY,
Clerk.

Brf. of Payson for Appts.

Filed Oct. 10, 1899.

Supreme Court of the United States.

CHARLES F. SIMMS, GEORGE T. BROWNE, Executors of the Will of James T. Simms, Decd., *Appellants*,

vs.

HANNAH T. SIMMS, *Appellee*.

No. 16

Brief for Appellants.

L. E. PAYSON,
For Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

CHARLES F. SIMMS, GEORGE T. BROSIUS, Executors, &c., *Appellants*, vs. HANNAH T. SIMMS, *Appellee*. } Appeal from the Supreme Court of Arizona.

BRIEF FOR APPELLANTS.

This was an action for a divorce, on a complaint filed by James T. Simms (now deceased, and for whom, as personal representatives, present appellants of record have been substituted), against appellee.

The complaint, charging desertion as a cause, was filed October 6, 1894, and avers that all the property owned by them was held severally, as the separate property of each.

The answer by appellee was filed October 18, 1894; it makes a general denial of the complaint, and is accompanied by a cross-bill alleging extreme cruelty; that in 1886 a homestead of 40 acres was selected out of their "community property," and, in June, 1889, an agreement was made between them for a division of all the other of the common property.

Nothing else in the cross-bill is deemed material here, beyond these dates, as the cross-bill was dismissed during the first taking of evidence; no date is given as to this but it was prior to June 12, 1895. (Trans., p. 45).

The referee was appointed April 17, 1895. The report of the evidence taken begins on page 19; about one day's work appears, when an adjournment was taken. (Trans., p. 45.) The parties met on June 12, 1895, and without any progress adjourned to June 17, 1895, when the "case was submitted." (Trans., p. 47.)

The case then proceeded on the bill, alleging desertion the general answer, replication and proofs; as also an application for alimony *pendente lite*, made on April 2, 1896, for "the sum of $5,000 as provisional alimony to enable this defendant to employ counsel and defend the above action."

This motion for temporary alimony shows an appearance by five attorneys for appellee for that purpose, and was accompanied by an affidavit of Mrs. Simms, that her husband has not since the suit, nor a long time prior thereto, contributed to her support.

She has 160 acres of land in Arizona, only; encumbered yielding no income; she has been compelled to mortgage it to pay interest and taxes; she is without means of support or to pay counsel, as she cannot further mortgage her land, or sell it; that her husband is abundantly able, etc. (Trans., pp. 57, 58.)

On April 4, 1896, Mr. Simms made his showing as to said motion and affidavit (Trans., p. 59) that the 160 acres of land Mrs. Simms had was derived from him, and worth $300 per acre, or $48,000, encumbered for only $8,000; sets out his financial condition as largely inferior to hers; that she has employed six attorneys, and no demand ever made on him for alimony until April 2, 1896.

A confirming affidavit by one Pickrell (p. 60) and counter affidavit by Mrs. Simms (p. 61) makes the record as to the application.

The application was not pressed in Court.

On June 6, 1896, the cause was heard on evidence taken by the referee, and a decree entered dismissing the bill of complaint; that defendant " is entitled to $750 counsel fees, and $150 per month for her maintenance since December 14, 1893, and judgment is ordered accordingly. (Trans., pp. 65, 76.) The formal opinion of the Court is found on that page also. Judgment formally entered of record, June 13, 1896.

June 8, 1896, a motion for new trial made, and grounds assigned, specially, 2d, that the judgment is contrary to the law; 3d, that the evidence does not sustain the judgment; and 4th, that the judgment for alimony is unjust and contrary to law. (Trans., p. 75.)

Motion for new trial overruled June 26, 1896. (Trans., p. 76.)

An appeal was duly prosecuted to the Supreme Court of the Territory and errors assigned. (Trans., p. 83.)

Specially urged were the points that no alimony should have been granted, as defendant had ample property to support her in her position in life; property of the value of $40,000, and that the monthly allowance in any event ought not to begin with December 14, 1893.

It may be stated here that the amount decreed by the District court on June 13, 1896, upon computation amounts to $5,250 exclusive of the costs.

While the case was pending on appeal in the Supreme Court of the Territory, on January 26, 1897 (Trans., p. 85), appellee filed an attempted release or remittance from the judgment of the District court of all in excess of $5,000, viz, $250. This move does not appear to have been followed up.

On February 23, 1897, in the Supreme Court, the decree and judgment of the District court for $5,250 and costs was affirmed. (Trans., p. 93.)

This was accepted by appellee, no notice being called to the attempt to remit, and the full judgment stands.

On March 16, 1897, a motion for a rehearing, upon the same points presented in the appeal, was made; on March 17, 1897, denied; an appeal to the Supreme Court of the United States allowed. (Trans., pp. 95, 96.)

The usual errors are assigned, but the only one urged here—because of the death of Mr. Simms—is as to the allowance of the "provisional alimony"—that it was unjust; it was contrary to law, and it was excessive.

On October 19, 1898, in this Court, a motion to dismiss the appeal was made by appellee on the ground that the proceeding being for a divorce, the judgment appealed from does not come within the statute allowing appeals "in suits at law or in equity in which the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars."

This motion does not appear to have been acted upon, and so, as it involves one of the principal questions in the appeal, we assume that the case will be taken by the Court and considered as presented.

ARGUMENT.

We submit that this allowance of alimony was wholly unwarranted upon the record.

The law upon the subject of the granting of alimony is elementary.

No question of a permanent allowance is presented, because the bill of complainant was dismissed, and because, as the record shows, the application of appellee, on which the allowance complained of was made (Trans., p. 57), asks for "the sum of $5,000 as provisional alimony to enable the defendant to employ counsel and defend the above action."

This was on April 2, 1896; the bill was filed October 6, 1894; answered October 18, 1894; referee appointed April 17, 1895; proofs before him taken in two actual days, and ended on June 17, 1895. Pending the taking of these proofs and before June 12, 1895, appellee's cross-bill was dismissed.

This application for alimony was not pressed nor acted on in court as a pending matter, for an allowance *pending* the suit.

The final hearing was had on June 6, 1896, and on that day a decree made dismissing the bill and making this allowance *on this application* of $5,250, of which $750 was to enable her to procure counsel to defend the suit!

In the absence of a statute upon the subject so providing, the allowance of alimony *pendente lite* is not a matter of right. Where a statute exists it, of course, regulates and determines the right of the wife.

Par. 2120, R. S. Arizona, 1887, provides:

"If the wife, whether complainant or defendant, has not sufficient income for her maintenance during the pending of the suit for divorce, the judge may either in term time or vacation, *after due notice*, allow her a sum for her support in proportion to the means of her husband, *until a final decree* shall be made in the case."

The italics are mine.

There is a clearly defined procedure outlined, as to certain conditions; a wife without sufficient income for her support, may make her petition, and *after due notice*, the judge may make a proper allowance, *until* the final decree.

If she desires an early allowance, she must make seasonable application; the diligence is for her, and the allowance can only be for the term, *after* due notice, and *until the final decree.*

Again, the statute in terms provides for the allowance in any contingency, *only* "during the pendency of the suit."

"If the wife * * * has not sufficient income for her maintenance during the pendency of the suit," says the statute; but here, although the bill was not filed until October 6, 1894, the order of the court made the allowance of $150 per month to begin December 14, 1893. (Trans. pp. 63, 65.)

This was for *ten months* before any suit was pending.

Could it be reasonably contended, that if, when the answer was filed October 18, 1894, a petition for alimony under the statute had been presented, due notice given, and affidavits, *pro* and *con* been submitted, that in any event, the allowance could have ante-dated the suit? Surely not, and yet here, at the time of final decree, the allowance is made to ante-date the suit nearly ten months, carrying nearly $1,500 to enable the wife to defend the suit, before it was begun.

We submit, that under this statute, the power to grant alimony is "pending the suit," and not when the suit is dismissed, refusing the divorce.

Illustrating the absurdity of this decree, remembering that appellee had in some way maintained herself during the pendency of the suit, and had secured and had the services of five, and part of the time six, distinguished attorneys from the beginning, suppose both parties had accepted the decree dismissing the bill, and resumed marital relations.

The wife, collecting this $5,250, would have had it not for support and maintenance "pending the suit," but as a bonus, a separate estate of her own, to be used as she pleased, while her husband was supporting and caring for her.

A careful examination of decided cases fails to show a

single case where an allowance of alimony, *pendente lite*, was made to begin before suit was instituted, and it is therefore insisted, upon reason and authority, that this phase of the allowance was clearly error, for which the judgment should be reversed.

The authorities are, that where a wife has succeeded in supporting herself and in making her defense, she is not entitled to an allowance for past expenses and counsel fees.

In Underwood *vs.* Underwood, 12 Fla., 444, it was said:

"*Ad interim* alimony, and the amount necessary to meet the expenses of the suit, are given, not as a matter of strict right in the wife, but as a matter of sound discretion for the court, * * * that discretion to be formed from an equitable view of the whole case. These expenses were not allowed in the court below, until the final decree in the case. "In *such* cases, independent of the statute, the rule is, the husband is not liable for these expenses."

Again, on p. 448, it is said,

"In the case in 3 Phillimore, 394, the precise question was, an allotment of alimony *pendente lite*, where it was two years before the wife applied, and in a case of great outrage upon the wife. The High Court of Delegates upon an appeal from the Consistory Court say, 'Considering that the wife was two years before she applied for alimony, we shall be disposed not to carry the grant back, but make it merely prospective.'"

So if the application is postponed until the hearing or decree, no allowance can be made unless the wife obtain a divorce.

In Collins *vs.* Collins, 10 Hun., 275, the question was, whether an order for temporary alimony should be made retroacting, as to time between the notice of the motion and the hearing, several years.

The Court say: "The plaintiff has supported herself

through these intervening years, and if she has become dependent again upon the property of her husband the allowance should not exceed what her present necessities require. The object is not to make provision for the past, but to maintain and support her, until, with the observance of reasonable expedition, her action may be determined. Page 276, "The husband should provide for plaintiff's present necessities."

In Thrall *vs.* Thrall, 83 Hun., 188, it is said,

"It seems settled by authority that the allowance of alimony *pendente lite*, can as a rule, be made only for future support, and should commence only at the time of notice of an application for its payment."

Citing: Collins *vs.* Collins, 10 Hun., 275;
Beadleston *vs.* Same, 103 N. Y., 402;
McCarthy *vs.* Same, 137 N. Y., 500.

In Beadleston *vs.* Same, 103 N. Y., 402, speaking of the purpose of the law in permitting allowances, *pendente lite*, the Court say, page 405:

"The allowance looks to the future. There can be no necessity for an allowance to make a defense already made, solely to pay expenses already incurred." "If she has succeeded in making her defense upon her own means, or upon her own credit, she cannot before judgment and while the action is pending have an order compelling her husband to pay such expenses. An allowance for past expenses *might* be authorized *if it were shown* that its payment was necessary to enable her to further carry on the action, or her defense thereto."

The italics are mine; of course, no pretense can be made here, that the contingency suggested is in this case.

In the case of McCarthy *vs.* Same, 137 N. Y., 500, the Court say:

"The statute is, during the pendency of the action the court may order the husband to pay any sum of money

necessary to enable the wife to carry on or to defend the action."

"An allowance may not be made to defray expenses already incurred, unless it is made to appear that their payment is necessary to enable the wife to further prosecute or defend."

Page 503:

"The allowance looks to the future, in the litigation, not for reimbursement, or to provide for future needs after the end of the litigation."

It is submitted earnestly that the whole current of authority is exactly in line with this authority. Applying the rules to the case at bar, we have a suit perfectly simple, involving only one question, viz, whether a refusal of a wife to leave a comfortable home, notwithstanding unpleasant relations with adult stepsons, and to go with her husband to an hotel, undesirable to her, but perfectly satisfactory to him, constituted a desertion or abandonment of the husband, so as to entitle him to a divorce. No other question in the case on the merits. Her cross-bill she had dismissed; all the evidence, the little there was, and of no complication whatever, was all in; she had supported herself so far, and so far as appears without difficulty.

She received the valuable farm of 160 acres, near Phœnix, valued by most of the witnesses at $300 per acre=$48,000, in 1889. On this she obtained by mortgage $4,500 in two mortgages subsequent to the separation, December 14, 1893 (Trans., p. 38), so that she had $4,500 in cash, and the equity in this property after they ceased living together; moreover, she had her home in his house without expense.

She *had* "succeeded in making her defense from her own means, or upon her own credit," and for aught which appears in this record, owed no one a dollar, either for sup-

port or counsel fees. Therefore the allowance by the court below was *wholly* reimbursing, and therefore unwarranted.

One item in the McCarthy case (137 N. Y. *supra*) was unpaid counsel fees, "what he, the attorney has charged the plaintiff, besides disbursements." Yet the court say—

"The allowance of such an item is unauthorized.

"It is apparent in this case that the wife had conducted the litigation out of her own means, or upon credit, from its commencement to a point where the case was closed, and nothing remained but an entry of judgment upon the referee's report."

(Exactly this case.)

"It did not appear that the wife still needed money to carry it on." So the allowance was refused, as it should have been here.

In Loverin *vs.* Loverin, 35 Pac. Rep., 87, the Court say:

"If the expenses of the action have been incurred or paid by her, with means derived from her separate estate or upon her credit, there can be no necessity for an allowance by the court to enable her to do that which she has already done. Without such necessity the court has no authority to make such an order." "When money is raised by the wife on her own credit, it is not reimbursable *pendente lite*, at the court's discretion, as money necessary to enable her to prosecute her action."

No better evidence of appellee's ability to mature her case to the point of a final hearing and decree can be had than the fact that she *did* so; and hence there was no necessity for an allowance *pendente lite*.

Moreover, be it observed, she only asked for provisional alimony to enable her "to employ counsel and defend the action;" this had already been accomplished, and she asked nothing for maintenance or support.

It seems to have been an arbitrary act on the part of the Court, speaking respectfully, for nothing appears in the

record that the motion, such as it was, was being pressed, even by counsel, who would be benefitted.

The decree recites (Trans., p. 65), that the cause came on for hearing, having been referred to a referee to take testimony, *which* having been taken, and *the same* having been argued by counsel to the court, and *the same* having been considered, "it is ordered," etc. That is, upon the pleadings remaining, and the testimony taken by the referee. In all this not a word appears as to the necessary expenses of appellee, or necessary or reasonable counsel fees; nor of the application for an allowance. We have the right to ask, upon what did the court base its judgment that $150 per month was a proper allowance for the then past two years and six months, from December 14, 1893, to June 13, 1896?

That the order made was to reimburse her, is perfectly evident, from the opinion of the Court. On page 66 the Court says, "*At the trial,* defendant filed motion for alimony and counsel fees, *pendente lite.*"

On page 74 of the Transcript, the Court says, "It appears on the hearing of the case that plaintiff has not provided anything for the defendant since their separation. She has also had to pay her numerous counsel to defend her rights. I do not think it necessary to make provision for the payment of all these counsel, as she had three firms employed. She is, however, entitled to a reasonable compensation for her counsel, and to a reasonable support pending this action." Then follows the order for $150 per month *since the separation,* and $750 to defendant for counsel fees.

Not a word in evidence, nor a finding by the Court as to what she had paid or agreed to pay as counsel fees; nor a word of evidence or finding by the Court as to what she had paid or agreed to pay for support since the institution of the suit.

More important, if possible, was the failure to find and determine the needs of the wife, based upon *her* financial condition, as compared with his, and the necessity of calling upon him because of her lack of resources. The law is perfectly clear upon this point, as shown by cases cited.

That this order was the exercise of a purely arbitrary judgment, is apparent from the amount of the allowance.

The wife was of middle age, lived " in the house on Center St., large house with all the comforts."

" The most attractive place about Phœnix." (Trans., p. 26.)

She had this free of rent, so that her sole personal expenses, in any event, would be all she could ask, if she had no resources of her own, and her application made in apt time. Eighteen hundred dollars a year for that purpose strikes the mind as anything but just.

Moreover, she had, as shown by the record (Trans., p. 38), $4,500 in cash, of her own, after the separation in December, 1893.

Equally subject to criticism is the allowance for counsel fees. The allowance, on its face, was intended not for reimbursement wholly, for the Court says it was not necessary to make provision for the payment of all she had employed, but as she " had to pay " those employed, the Court arbitrarily fixed $750, as reasonable reimbursement, toward what she had paid, without any proof whatever as to either the amount paid to all, or what would be reasonable to those she would be justified in engaging, if the husband were chargeable. The amount was grossly excessive, if based upon the idea of reasonable expenses. Not a complication in the case calling for more than the most ordinary effort; not a dispute of fact on the main question of desertion; only a simple question of law, whether the refusal of the wife to go to the hotel to live constituted " de-

sertion." It would be a poor compliment to any one of the distinguished counsel to say he could not alone do the work as well as all; and it is not deemed improper to predict that competent counsel would readily be found who would gladly perform necessary professional work in such a case for $250.

As stated above, it is assumed that one of the questions which will be presented by appellee is whether this Court has jurisdiction of the case, upon the ground that appeals to this Court are limited to "suits at law and in equity in which the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars," and that for two reasons the jurisdiction of this Court will not attach; because, (*a*) an allowance of any sum of money, *pendente lite*, in a divorce proceeding, being an incident to the principal controversy, viz, a continuance or dissolution of the martial relation, is not a "matter in dispute" in the litigation as to which the action of the Court below may be reviewed on appeal; and, (*b*) that appellee, having filed the supposed remitter of $250 in the office of the clerk of the Supreme Court on January 26, 1897, cut off the right of appeal to this Court, if it existed.

The final judgment in the District Court was on June 13, 1896.

The appeal from that court to the Supreme Court was perfected by the filing and approval of the usual bond June 30, 1896. (Trans., pp. 81, 82.)

The deeree of affirmance in the Supreme Court was on February 23, 1897; it was not only an affirmance, but also a formal judgment for $5,250 and costs, and ran against the sureties as well as the principal in the bond; *this* is the judgment appealed from, to this Court. (Trans., p. 93.)

Reference will be made, doubtless, to Barber *vs.* Barber, 21 Howard, 582, as showing that this Court disclaims jurisdiction in the courts of the United States upon the subject of divorce or any incident thereto, but of course, that has reference entirely to the courts of the United States in the States, and has no reference nor could have any to the Territorial courts.

As to the first question (*a*) whether this judgment appealed from, for $5,250 and costs was such a "matter in dispute" as that it could be reviewed on appeal here, seems perfectly clear, both on principle and authority.

The contention of appellee is, that the allowance of temporary alimony in a divorce proceeding is a mere incident to the proceeding; "probably to be regarded more as costs in the case," and that the action of the judge of the trial court, in allowing it, is so much an arbitrary exercise of power, though called "a discretion," that it cannot be reviewed by a superior tribunal.

I do not think so.

While the allowance of alimony is a matter for the "discretion" of the trial court, it is always to be taken as a *sound, judicial* descretion, to be exercised after a full consideration of all presented facts, affirmed or denied, precisely as in the determination of every question presented to a judicial tribunal.

There must be a judicial ascertainment of two facts, before such an allowance can be made, first, necessity therefor on the part of the wife must appear, from her want of sufficient means to maintain herself during the litigation, and with which to employ counsel.

The *fact* that the wife is destitute of means to carry on the suit and support herself during its pendency, is as essential as any other fact to authorize the Court to award temporary alimony; because, if the wife has sufficient separate prop-

erty, the reason for giving her alimony to defray the expenses of her defense does not exist, and she is not entitled to it.

Westfield *vs.* Westfield, 36 N. J., Equity, 195.

When the wife has sufficient separate property, the reason for giving her temporary alimony, or suit money, does not exist and she is not entitled to either.

Bishop, M. and D., sec. 394.

Second: it must also appear that the husband has pecuniary means to supply the necessity found to exist as stated.

These two conditions must be judicially ascertained before a temporary allowance can be made.

See Hadden *vs.* Hadden, 18 Southern Rep., 779, and cases cited.

In this case it is said, "It is further well settled that the granting or withholding of such allowance is within the discretion of the court, to whom the application therefor is made; but this discretion is not an arbitrary one, but is a judicial discretion, to be exercised in accordance with the established rules, wisely adapted to the facts apparent in each particular case, and when the discretion is abused is a matter from which an appellate court will grant relief."

Citing Cooke *vs.* Cooke, 2 Phill., sec. 40.

"That she, the wife, had equally as much, in fact considerably more property and available means than her husband, and that she acquired all of it from her husband, that the requisite necessity on her part for the allowance of temporary alimony and counsel fees was conclusively shown to be absent, and that her application should, therefore, have been denied."

The decree below was reversed. This case of Hadden is exactly like the case at bar.

In Cooke *vs.* Cooke, 2 Phill., 40, it is said :

"Alimony is discretionary with the court, but it is a judicial and not an arbitrary discretion which is to be exercised, and therefore clearly the subject of appeal."

Perhaps the best expressed exposition of the law on this phase of this case is found in the opinion in Leslie *vs.* Leslie, 6 Abb. P., N. S., 196.

"Any order or judgment which imposes upon a party such a charge as the payment of money, not as a condition upon which some favor or relief is granted to him, to which he is not entitled as a matter of right, but which is imposed upon him absolutely, as an obligation, and which may be enforced by execution, or summarily against his person, affects a substantial right, if he ought not to pay it, or if a greater amount is imposed than he ought to be subjected to. Such an order is not in the sole discretion of the judge who makes it, but is the exercise of a legal discretion, which, if erroneous, may be reviewed and corrected.

Orders for the payment of alimony and counsel fees come under this class—

1. For the reason that they peremptorily impose upon the husband the payment of money.

2. Because the allowance of temporary alimony by a court of equity is subject to certain rules which have been long recognized and acted upon.

3. It has always been held that such orders are reviewable."

It only remains to notice the second question (*b*), viz, whether by the filing of the supposed remitter of $250 in the office of the Clerk of the Supreme Court on January 26, 1897, thus attempting on that date to limit the amount to be collected to $5,000, the right of appeal is cut off by that attempted reduction.

The decree of the District Court was appealed from and perfected by the approval of the bond on June 30, 1896.

This ended the jurisdiction of that court in the case, at most, on the adjournment of the term. No steps were taken further in that court, but, pending the perfected appeal in the Supreme Court, this remitting was attempted.

A complete answer to this attempt to remit is found in the dissenting opinion of Mr. Justice Rouse of the court below, which I print herewith and as part of this argument. The case itself does not appear to be reported as yet, so I file a certified copy of that opinion as well.

It may be added, however, that the remitter was not only not pressed upon the Supreme Court, but that the judgment of affirmance was rendered after its filing, and was for the full sum appealed from, $5,250, and costs of suit, so that if that record and judgment shall stand, execution will of course issue for the full sum. (Trans., p. 93.)

That is *the* judgment appealed from; the one which will be collected if affirmed here, necessarily and therefore the amount over which we are contending here—"the matter in dispute" under the statute, is $5,250, as of February 23, 1897, and costs of suit.

The following is so much of the dissenting opinion of Mr. Justice Rouse, as pertains to the questions here:

> "To the judgment of this court affirming the said judgment of the district court, allowing said sum for counsel fees and the allowance to defendant of $150 per month from December 14, 1893, as alimony, I dissent.
>
> It appears from the record that the defendant has no children, or any one dependent upon her for support; that long before there was any move on the part of plaintiff toward an effort to secure a divorce, a division of plaintiff's property was made with defendant, so that, by good and sufficient instruments, what was considered by both parties to be one-half of all his possessions was transferred to her. By said transaction defendant received real estate from plaintiff

proven on this trial to be worth at the date of the trial something over $40,000. That said property was her separate property, and under her control from the date when so conveyed to her, and from that time to the date of the trial. Said division of the property was made with the express purpose of disposing of the community property, and to make full preparations for the preservation of the wife's rights.

The statute of this territory provides:

'If the wife, whether complainant or defendant, has not a sufficient income for her maintenance during the pendency of the suit for a divorce, the judge may, either in term time or in vacation, after due notice, allow her a sum for her support in proportion to the means of the husband, until a final decree shall be made in the case.'

R. S. of 1887, paragraph 2120.

That statute gives the judge or court, pending the action, certain power. This power of the judge or court depends, first, upon the fact that the wife has not a sufficient maintenance; second, after due notice has been given; third, the allowance must be in proportion to the husband's means; fourth, the allowance can only be until the suit is terminated.

The complaint in the case at bar was filed October 9, and the answer thereto October 18, 1894.

No motion for alimony was made by defendant until April 2, 1896, nearly eighteen months after issue was joined. On that date her motion was made and notice served on plaintiff and counter affidavits were filed, but no order was made with reference thereto, and nothing done thereon until the date of the final judgment, June 6, 1896, and then *only in the final judgment.*

The power to grant alimony is pending the action for divorce, not at the time when the divorce is refused and case is dismissed. It is an allowance for the wife's

support, and to provide her with the means to prosecute the action or make her defense.

R. S., paragraph 2120.

She had maintained herself and had been represented by a number of distinguished attorneys from the beginning. The suit was at an end when the judgment for an allowance was made.

Again, the record shows that defendant owned property in her own right, acquired from plaintiff, of equal value to that which he owned, of the value of over $40,000, which was productive. Before alimony can be allowed, it must be shown that the wife has not sufficient income for her maintenance during the pendency of the action.

Paragraph 2120, *supra.*
Bishop, Marriage and Divorce, sec. 394.
Collins *v.* Collins, 80 N. Y., 12.

The judgment in this case for alimony was at the time the divorce was refused; it was not pending the action.

The judgment then was a money judgment in favor of the wife, to be enforced against her husband by an execution, notwithstanding the fact that she was possessed of large means, and was robed during the pendency of the suit with the marital right to draw on her husband's credit for her support, and notwithstanding the fact that she may have secured a maintenance in that way during that time. The allowance was $150 per month for a period from December, 1893, up to the date of the judgment; covering a period of nearly a year before the suit was filed; covering a period when only the mutterings of a threatened domestic storm was approaching, but when no storm was actually raging.

The judgment for alimony was for a sum over $5,000, of which $750 was for counsel fees.

The statute only authorizes the court to make an allowance to the wife for her maintenance during the

pendency of the suit; the allowance cannot be made after the suit is terminated. The allowance can only be on motion made after notice, not before, and certain conditions must be shown to exist before the order can be made. In this case the motion was made and notice given but no order was made. The action is for a divorce, and not an action for a division of the property between plaintiff and defendant, or for a personal judgment between them. The divorce being refused, the parties remained husband and wife, with all the rights of such, and governed by all the laws pertaining to the marital relation. The only judement that could be pronounced in this case, on the refusal of the divorce, was a judgment for costs. If the court had, prior to that time, made an order allowing the wife support, etc, and said order had not been complied with, it would have had power to have enforced said order; but it had no power to enter the judgment for allowance, which was entered. That judgment, as has been stated, reaches back to a time when *there were no domestic troubles*, and, in effect, regulates the domestic affairs of the parties at a time when they were *not before the court.*

By statute it is provided:

'The court pronouncing a decree of divorce from the bonds of matrimony shall also decree and order a division of the estate of the parties in such a way as to the court shall seem just and right, having due regard to the rights of each party and their children, if any; provided, however, that nothing herein contained shall be construed to compel either party to divest him or herself of the title to separate property.'

R. S. 1887, paragraph 2114.

If a divorce had been granted in the case at bar, the court could have divided the community property between the parties, as would have been just and right, but could not have interfered with their separate property.

It is further provided:

'The court may award costs to the party in whose behalf the sentence or decree shall pass, or that each party shall pay his or her own costs, as to the court shall appear reasonable.'

R. S. of 1887, paragraph 2122.

There are no other provisions of the statutes applicable to the case at bar, and hence we hold that the only judgment the court could render was a judgment for costs of the suit.

The judgment was entered in this case on the 13th day of June, 1896, for the sum of $5,235, exclusive of costs, and the motion for a new trial and to set aside said judgment, was overruled and denied on June 29, 1896. Thereafter, on June 30, 1896, plaintiff filed an appeal bond in the sum of $11,000, which was duly approved, and appeal granted. Thereafter, on the 15th day of July, 1896, defendant gave notice to plaintiff that on July 27, 1897, she would apply for an order for alimony, pending the appeal of said case, and on said date last mentioned the judge made a decree, ordering and adjudging that plaintiff pay to defendant, within ten days, $250 for her support, as alimony at the rate of $150 per month from the date of the said former decree, viz, June 13, 1896; and the further sum thereafter of $150 per month in advance, from the 1st day of August, 1896, during the pendency of the action; and the further sum of $500 as counsel fees.

Thereafter, in the supreme court, the appellee, defendant below, on the 27th day of January, 1897, filed in the supreme court her motion, prepared on January 23, 1897, for an order dismissing said appeal, for the reason that appellant had not complied with the decree and order last above referred to, and on the same date, viz, January 27, 1897, her attorneys, Messrs. Kibbey, Barnes, Millay, and Bennett, filed a motion to remit all of the judgment of the district court for alimony and

attorneys' fees, in excess of $5,000, to-wit: the sum of $250.

It will be observed that at the date of the judgment the amount decreed in favor of defendant was $5,250; that plaintiff perfected his appeal on June 30, 1896; that thereafter the court decreed that plaintiff should pay defendant $150 per month; that $250 was due to August 1, 1896; that in addition thereto he was to pay her $500 for counsel fees. Due at the date of said motion, viz, January 27, 1897:

Original judgment	$5,250.00
Alimony to August 1, 1896	250.00
Alimony per month thereafter to February 1, 1897	900.00
Counsel fees	500.00
Making in all	$6,900.00

The bond on appeal was both an appeal and a stay bond. After it was executed, approved, and filed, the appeal was complete, and the district court no longer had jurisdiction of the case.

R. S. of 1887, paragraph 865.

The case then was under the jurisdiction of the supreme court on appeal, and said court had jurisdiction of the case, as it was on the date the final judgment was entered by the district court.

'Any party in whose favor a verdict has been rendered may in open court remit any part of such verdict or judgment, and such remitter shall be noted on the docket and entered in the minutes, and execution shall thereafter issue for the balance only of such judgment after deducting the amount remitted.'

R. S. of 1887, paragraph 817.

It is evident from said paragraph and from the remaining paragraphs of the chapter of the statutes to which it belongs, that the remitter can only be entered

in the district court, and only in that court before an appeal has been perfected, excepting as is provided by the following:

'If in any judgment rendered in the district court there shall be an excess of damages rendered, and before the plaintiff has entered a release of the same in such court in the manner provided by law, such judgment shall be removed to the supreme court, it shall be lawful for the party in whose favor such excess of damages has been rendered to make such release in the supreme court, in the same manner as such release is required to be made in the district court; * * *'

The course to be pursued in entering a remitter not in term time, is pointed out and directed by paragraph 818, R. S. of 1887. That course was not pursued in this case, and even if the case at bar was such in which a remitter could be entered, the appellee failed to pursue the course prescribed by law and the judgment has to remain as it was entered in the district court.

It will be observed, however, that the right to remit is given only to a plaintiff. It is evident that the right is given to one who has instituted a suit to recover a money judgment or property of a certain value, that he may make a verdict or judgment which is in excess of the amount claimed, a valid verdict or judgment by having them correspond with the allegations of the complaint, or to correspond with the evidence on the trial. In the case at bar, the judgment was for $5,250; to secure an appeal and a stay of the judgment, plaintiff was required by law to execute a bond for at least double that sum. A bond in a smaller sum would not have stayed the execution.

The right of appeal from the district to the supreme court is fixed on a value of the matter in controversy, at $200. Suppose the judgment of the district court exceeds that sum and an appeal is taken,

can it be successfully maintained, that after the appeal has been perfected, the appellee can destroy the jurisdiction of the supreme court by entering a remitter so as to bring the amount just under $200?

Again, suppose a suit should be instituted in a court for a sum in excess of the jurisdiction of said court, could jurisdiction be retained by the plaintiff, after judgment, remitting all in excess of the jurisdictional sum? We contend that a remitter can only be made to correct an error in the verdict or judgment, by reason of the fact that the verdict or judgment is in excess of the amount claimed, or that the evidence does not support the verdict or judgment.

It is apparent that in the effort to remit the insignificant sum of $250 that it was the purpose of appellee to prevent the case from going to another tribunal for review, by having the judgment reduced to just $5,000. As stated before, this is not an action for a money judgment. The money part of the judgment is a mere incident. It was imposed, in our judgment, without any legal authority, hence we think tho judgment should be reversed, and the case dismissed.

O. G. ROUSE,
Associate Justice, Supreme Court."

It is therefore confidently submitted that the judgment below should be reversed.

Respectfully submitted,

L. E. PAYSON,
For Appellant.